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IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-6632

MINOR MOODY,
Petitioner,

v.

LOREN DAGGETT, Warden,
Respondent.

BRIEF

On the Merits in Support of Respondent, Submitted Amicus Curia by the States of Tennessee, New Jersey, Idaho, Arkansas, Kentucky, California, North Carolina, Oregon, Ohio, Maryland, Illinois, South Carolina and Nebraska

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BRIEF

On the Merits in Support of Respondent, Submitted Amicus Curia by the States of Tennessee, New Jersey, Idaho, Arkansas, Kentucky, California, North Carolina, Oregon, Ohio, Maryland, Illinois, South Carolina and Nebraska

The States of Tennessee, New Jersey, Idaho, Arkansas, Kentucky, California, North Carolina, Oregon, Ohio, Maryland, Illinois, South Carolina and Nebraska by their respective Attorneys General, pursuant to Rule 42 of the Supreme Court of the United States, submit their *amicus curiae* brief on the merits in support of the Respondent in the above-entitled cause.

JURISDICTION

This Court has jurisdiction to review this cause by writ of certiorari pursuant to 28 U.S.C. § 1254(1), and has accepted it for such purposes by granting said writ on March 1, 1976.

CONSENT OF PARTIES

The *amicus curiae* brief is filed pursuant to Rule 42(4) of the Rules of this Court, and thus consent of the parties is not required.

QUESTION PRESENTED

1. Whether a parolee who is incarcerated for a new criminal offense, incurred while on parole, may be afforded a hearing by a parole board on the issue of revocation after the service of the intervening term of incarceration.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> "§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTEREST OF THE AMICI

Although this case arises under the Fifth Amendment, the issue presented has its origin in *Morrissey v. Brewer*, 408 U.S. 471 (1972), decided under the Fourteenth Amendment. The States of Tennessee, New Jersey, Idaho, Arkansas, Kentucky, California, North Carolina, Oregon, Ohio, Maryland, Illinois, South Carolina and Nebraska [hereinafter "State" or *"amici"*] therefore believe that a resolution of the issue at bar would directly influence their respective parole revocation practices with respect to parolees who commit new crimes beyond the borders of each State.

Many of these parolees are presently incarcerated for new federal offenses in federal institutions and by virtue of conflicting federal court opinions must be afforded prompter revocation hearings than present state law requires. As to these parolees of the respective States, the present case is of direct consequence.

STATEMENT OF THE CASE

The *amici* accept and adopt the "Statement of the Case" contained in Respondent's brief on the merits.

ARGUMENT

Where a Parolee Is Incarcerated for a New Criminal Offense, Incurred While on Parole, a Hearing on the Issue of Revocation May Be Postponed Until After the Service of the Intervening Sentence.

This case represents a review of the conflicting opinions of the various United States Courts of Appeal as to the necessity of according a parolee a revocation hearing while he is incarcerated for a new crime. The several opinions have similar facts except that the warrant charging a parole violation is not always issued by the federal authorities nor is the prisoner in question always serving time in a federal institution. The cases, both federal and state, involve situations where there is a federal warrant on a federal prisoner,[1] a federal warrant on a state prisoner,[2] a state warrant on a federal prisoner,[3] and a state warrant on a state prisoner.[4] While the facts in the case at bar

[1] *Cook v. United States Attorney General*, 488 F.2d 667 (5th Cir. 1974), *cert. denied*, 419 U.S. 846 (no prompt hearing required); *Cleveland v. Ciccone*, 517 F.2d 1082 (8th Cir. 1975) (prompt hearing required); *Jones v. Johnston* — F.2d —, 19 Cr. L. 2088 (D.C. Cir. 1976) (prompt hearing required).

[2] *Burdette v. Nock*, 480 F.2d 1010 (6th Cir. 1974) (no prompt hearing required); *Small v. Britton*, 500 F.2d 299 (10th Cir. 1974) (no prompt hearing required); *Reese v. United States Board of Pardons and Paroles*, 530 F.2d 231 (9th Cir. 1976) (no prompt hearing required); *Gaddy v. Michael*, 519 F.2d 669 (4th Cir. 1975) (no prompt hearing required); *United States ex rel. Hahn v. Revis*, 520 F.2d 632 (7th Cir. 1975) (prompt hearing required).

[3] *Hofmann v. Wainwright*, 332 So.2d 18 (Fla. 1976) (no prompt hearing required); *In Re Shapiro*, 537 P.2d 888 (Cal. 1975) (prompt hearing required).

[4] *Betrand v. Hunt*, 308 So.2d 760 (La. 1975) (no prompt hearing required); *Russell v. Cooper*, 211 S.E.2d 655 (S.C. 1975) (no prompt hearing required); *Cooper v. Lockhart*, 489 F.2d 308 (8th Cir. 1973) (prompt hearing required).

only present the first situation, a resolution of the issue involved would be dispositive of the other three, since, for all practical purposes, they are constitutionally indistinguishable.

Under federal statutes,[5] when a parolee is convicted for a new crime committed while on parole the federal authorities invariably charge him with a violation of parole. When the parolee is serving the new sentence in either a federal or state prison, the violation warrant is lodged as a detainer with the institutional warden.[6] While the Parole Commission may, from time to time, consider the propriety of continuing the detainer,[7] the parolee apparently receives a hearing on the issue of parole revocation only some time after the detainer is "executed."[8]

The above procedure parallels the almost universal practice of the states,[9] of issuing a parole violation warrant and lodging it as a detainer where the parolee is convicted of a crime in another jurisdiction.[10] During the interim sentence, the parolee

[5] 18 U.S.C. § 4213, *et seq.*

[6] 18 U.S.C. § 4214(b).

[7] 18 U.S.C. § 4214(b)(2). These reviews may include a "dispositional hearing" where the parolee is confined.

[8] 18 U.S.C. § 4214(d).

[9] The *amici* have made every attempt to ensure that statements made about state parole revocation practices are accurate. However, except for the states actually participating in this brief, the practices can only be described in a general manner due to local variations which may rapidly change due to the fluid nature of the law in this area. See *United States ex rel. Burgess v. Lindsey*, 395 F. Supp. 404 (E.D. Pa. 1975), where an action for monetary damages against a state parole board was dismissed due to a lack of clarity of the decisions as to the board's responsibilities.

[10] In some jurisdictions where the parolee receives "street credit" for the time he is on parole (the federal system denied this credit under former 18 U.S.C. § 4205), there is an additional stage wherein the parolee's sentence is tolled, preventing the sentence from expiring. See *e.g.* Tenn. Code Ann. § 40-3619 and N.Y. Penal Law § 70.40(3)(a).

is not afforded a hearing while he is in the custody of another state or the federal government. Virtually all parole boards will, however, respond to any written questions the parolee might have as to the accuracy of the parole violation charge, which is inevitably based on the new conviction. Thus, if a prisoner denies that he is the same person who was convicted, or asserts that the board is misinformed as to the nature of the crime, the parole board will normally respond to this inquiry to ascertain if the contention is correct. Other than as to correspondence, state procedures make no provision for "dispositional interviews", as such, at the foreign prison. At the conclusion of the intervening prison incarceration, as opposed to the legal expiration of the full term, the detainer warrant is executed whereby the parolee is physically returned to the paroling state for a revocation hearing. At the hearing, the board has the option of revoking parole (which usually means completing at least a portion of the original term in prison) or of refusing to sustain the violation (which usually means the parolee is allowed to resume a parole status). The timing of the revocation hearing is thus dependent for the most part on when the parolee is released from the physical custody of the foreign jurisdiction.

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), this Court held that a parolee who was arrested at the direction of the parole authorities and summarily returned to prison was entitled to certain procedural safeguards prior to the termination of his parole. This holding was grounded on the finding that the parolee's status of conditional liberty was a constitutionally protected interest. The parolee could not be deprived of his conditional liberty without notice and opportunity for a hearing where he could contest the allegations that he violated his parole and that the violation was serious enough to warrant revocation. These hearings had to be tendered to the parolee with reasonable dispatch after he was taken into custody, and *Morrissey* suggested that two months was not an unreasonable time.

It is apparent that a parolee imprisoned, not for a violation of his parole, but for a new criminal conviction is under a different type of custody than *Morrissey* contemplated as initiating the revocation process. The convicted parolee under current state procedure has a stake in "conditional liberty" only when he is arrested by the authorities of the paroling jurisdiction at the conclusion of his intervening prison incarceration. Only at that point does the possibility exist that he may be free to resume the conditions of his original parole. Logically, the state would appear to have some duty to tender a hearing to a parolee, at the latest, when the risk of actual imprisonment beyond the term of the interim sentence engenders a related potential for "grievous loss" as in the case of the parolee examined in *Morrissey*. Thus, the present inquiry narrows to whether the state has some duty to tender the revocation hearing at an earlier point during the interim sentence.

This Court has held that "some form of hearing is required before an individual is *finally* deprived of a property interest." (emphasis supplied). *Mathews v. Eldridge*, — U.S. —, 96 S.Ct. 893, 902 (1976). The same consideration has been extended to interests in liberty. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). A hearing once required by due process must be conducted "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *Morrissey* itself stressed, however, the inherent flexibility of due process, 408 U.S. at 481, which considers "time, place and circumstances." *Cafeteria and Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886 (1961).

In *Mathews v. Eldridge*, *supra*, at 903, the Court identified the factors which must be weighed in determining whether existing governmental procedures affecting interests in property could withstand constitutional scrutiny. Although the interest here is in liberty, the same analysis would be appropriate. The three factors are: (1) the private interest that will be affected by the

official action; (2) the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

A

The first factor considers the effect of official action on private interest. The inquiry in the case at bar goes more properly to inaction, although the mere existence of the parole violation charge does have some effect on the parolee during the term of the intervening sentence. This effect goes to the presence of the "detainer" which the parole authorities have against the parolee while he is serving the new sentence. Apparently the presence of this detainer has certain consequences on the parolee which would not otherwise occur absent the detainer.[11] Even assuming that these consequences might be deemed punitive, this ignores the root causes of the "problem", which is not the filing of the detainer but the attributes which the foreign jurisdiction attaches to it.

A parole board filing a parole violation detainer against one of its parolees does so only to keep track of the parolee, who may be transferred to many separate prisons within the penal structure of another state.[12] The detainer assures that when the parolee is released from the physical custody of an institution in another jurisdiction, he will not flee. In this sense, the detainer has the effect of promoting a prompt disposition of the parole

[11] The status of a prisoner with regard to certain privileges or lack thereof is probably due more to the type of crimes committed and length of sentence than to any outstanding detainers.

[12] *Cf. Meachum v. Fano*, — U.S. —, 44 L.W. 5053 (June 25, 1976).

violation charge, since the holding jurisdiction will retain a prisoner but for a short time after he is due to be released.

With regard to the purportedly adverse effects of a detainer, it should be noted that even if the parolee would get a speedier hearing and if his parole were officially revoked the detainer would continue anyway.[13] Considering the probability of non-revocation, discussed *infra*, the chance of removing the detainer is slim indeed. The rare exception where the parolee prevails in an interim hearing should temper somewhat the weight to be accorded to any adverse effects which the detainer may have on the average parolee's interest.[14]

Turning to the parolee's interest in the speedier hearing itself, it is apparent that any administrative hearing conducted long after the event which is the subject of the hearing acts, to some degree, as a limitation on the individual's ability to respond to the charges. When the hearing is concerned with resolving disputed facts, the need for a swift determination is vital. *Morrissey* contemplated the possibility of a preliminary hearing to gather facts while information was still fresh, even before

[13] See *Cooper v. Lockhart*, 489 F.2d 308, 316 n.14 (8th Cir. 1973).

[14] At least one state, Tennessee, has attempted to ameliorate the effects of the detainer prior to the final revocation hearing. Rule 0420-1-1-.18(7) of the Tennessee Parole Board provides that when Tennessee cannot obtain physical custody of a parolee serving time in a foreign institution, the parole detainer is physically withdrawn and the other institution is requested to notify Tennessee sixty days prior to the release of the parolee. This request is in letter form and instructs the custodian "that said letter is not in any way, to be construed as altering any treatment or rehabilitative program which the custodian desires to implement on behalf of the parolee." When Tennessee is finally notified that the parolee is about to be released, the violation warrant is again lodged as a detainer "so that the parolee might be returned to the physical custody" of Tennessee. This procedure was taken from a suggestion in *Cooper v. Lockhart*, 489 F.2d 308, 317, n. 16 (8th Cir. 1973). This might not work for all jurisdictions since credit for time on parole might be keyed to the filing of the detainer.

the final hearing.[15] However, in the type of parole violation hearing conducted where the violation is established by a conviction of record, the parolee cannot realistically contest the fact of a *prima facie* violation. Therefore, a delay of any magnitude in the hearing has no effect on the parolee's interest with respect to the existence of a violation.

Morrissey was concerned, not only with the finding that a violation *per se* may have existed, but also with whether certain mitigating factors as to the propriety of revocation were present. A delayed revocation hearing affects the opportunity of the parolee to offer mitigating factors surrounding the violation, and thus the parolee has some interest with respect to this issue. However, when the violation is grounded on a conviction for a new crime which carries a term of imprisonment, the interest of the parolee in avoiding a potential loss of mitigating factors is at its lowest ebb. Whatever mitigating factors existed with respect to the new crime were obviously presented to the sentencing judge, who just as obviously found them unavailing. The court before which the parolee was convicted had all the facts, both as to the commission of the offense and as to the factors which prompted it. The court had access to pre-sentence reports and probably a more extensive background analysis of the convicted parolee than a parole board has in a revocation hearing. In addition, in *every* case the parolee had the assistance of counsel who zealously argued for the parolee's fitness for a suspended sentence or perhaps only a fine. Yet despite all these factors, the parolee was incarcerated. The mitigation of such a crime before a parole board is therefore almost nonexistent. The parolee's interest in preserving this "evidence," such as it is, certainly is of little consequence.

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[15] A preliminary hearing should not be required where the parolee is already convicted of a new offense and is incarcerated even for violations occurring within the same jurisdiction. *United States v. Tucker*, 524 F.2d 77 (5th Cir. 1975), *cert. denied* 18 Cr.L. 4198 (1976).

On the other hand, the parolee's interest in presenting mitigating factors becomes more important at a revocation hearing held after the intervening sentence. The opportunity in *Morrissey* to present evidence in mitigation was necessary simply because the parole violations there were based on conditions "picayune" in nature.[16] The ability to establish mitigation rose to constitutional dimensions because of the parole board's function of conflict resolution as between the counselor's and parolee's perspectives of the significance of a slight deviation from the rules.[17] In the type of mitigation at issue in the case at bar, conflict resolution as to the import of a violation is no longer a factor immediately after a conviction. The real issue is the propriety of revocation in light of the parolee's institutional record, which can best be demonstrated after serving the interim sentence. Thus, the present procedures may affect the parolee's interest in a favorable rather than a negative manner, by giving him an opportunity to "create" mitigating factors even after the violation occurred.

If the parolee can have a hearing pending the service of the intervening sentence, the possibility may exist that the board might revoke parole and allow him to serve his old sentence concurrently with the new sentence. A delay in the hearing purportedly eliminates this eventuality from ever transpiring. Under many state statutes, however, this is not even a factor since new convictions sustained by parolees are required by law to be served consecutively.[18] But, even in states in which a parole

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[16] Note, *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 1, 98 (1972).

[17] *Cf. Goss v. Lopez*, — U.S. —, 95 S.Ct. 729, 741 (1975):

> "But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context." See also *Preston v. Piggman*, 496 F.2d 270 (6th Cir. 1974), involving a "technical" violation of parole.

[18] See *e.g.* Tenn. Code Ann. § 40-3620; Ill. Rev. Stat. Ch. 38 § 1003-3-9(a)(3)(ii); N. J. Stat. Ann. 30:4-123.27.

board has some discretion as to concurrent time, state statutes often contemplate the possibility of credit *ab initio*.[19] *Cf. In Re Shapiro*, 537 P.2d 888, 895 (Calif. 1975):

> The only conceivable prejudice [the state parolee] has suffered from failure to afford a timely hearing is the loss of credit [on his state sentence] for the time he has served at [the federal institution]. Such prejudice can be cured by restoring this credit if the [Board] ultimately decides to reinstate parole.

A parole board at a revocation hearing held after the intervening sentence thus may have available tools with which to deal with various "credit" situations. Moreover, where two states are involved, the parole board in the jurisdiction where the parolee is confined may grant parole to the initial state before the sentence is fully served which has the practical effect of at least a partial concurrent sentence.[20] While practice may vary from state to state, a parole board traditionally has far more flexibility than a court in adjusting time in and out of prison walls. Therefore, in those states where the possibility of concurrent time is a factor, the parolee's interest in maintaining this possibility is not always lost forever simply because the hearing is held at the conclusion of the new prison term.

Delay also allegedly causes the parolee anxiety as to whether his parole will be revoked some time in the future. This concept is borrowed from speedy trial cases where the untried defendant is presumed to be innocent of the crime charged.[21] But where a parolee is convicted of a new crime,

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[19] See *Hofmann v. Wainwright*, 332 So.2d 18, 20 (Fla. 1976).

[20] This is known in the genre as "paroling to a detainer" whereby a person is on parole from one sentence but is serving another in prison at the same time. See *e.g.* Federal Parole Rules § 2.31, 41 Fed. Reg. 19335 (May 12, 1976).

[21] *Smith v. Hooey*, 393 U.S. 374, 379 (1969).

he is no longer presumed to be "innocent" of violating his parole, and the only inquiry remaining is whether it will be revoked or not. This goes to the consequences of the violation and not whether it occurred, and so this is of a lesser dimension than in a criminal case.

B

The second factor to be considered in determining the adequacy of existing procedure is the risk of an erroneous determination and the probable value of a speedier hearing. This Court has previously noted that parole "revocation proceedings may offer less protection from initial error than the more formal criminal process . . ." *Gerstein v. Pugh*, — U.S. —, 95 S.Ct. 854, 867 n. 22 (1975). Where a revocation is based on a criminal conviction, the possibility that error may occur as to the *fact* of a violation is not magnified by the passage of time. Certainly, the parole board in its deliberations can justifiably rely on the prior judicial proceeding and the resulting prison term, both for the existence of a violation and a lack of mitigation. This does not mean that the parole board abdicates its role to a different tribunal but it does suggest that the board can accurately perform its function in due course at any time after the conviction occurred.

One method of ascertaining whether present procedures are prone to error is to consider whether delay might have some effect on the incidence of revocation. In other words, would a prompter hearing increase the chance of non-revocation. The few available statistics show that a parolee receiving a hearing shortly after a conviction occurs has close to a 100% chance of revocation.[22] While figures for revocation based on out-of-

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[22] Kentucky accords parole violators a hearing as soon as they are received at the Kentucky prison. Thus, violations based on in-state convictions are determined more rapidly than convictions oc-

state convictions are almost nonexistent (due to the fact that few hearings have yet been held), it is suggested that parolees confined in distant states would fare no better should their hearings be held at some earlier point in time. The clear implication is that a parolee returned at the conclusion of the intervening sentence would at least have a greater possibility of non-revocation.

There are several factors which might support this conclusion. First, a parole board subjectively would be less likely to revoke, given the fact that the violator has already "paid his debt" for the new crime.[23] Secondly, a parolee with a good institutional record at the foreign prison might be deemed to have demonstrated the lack of necessity for further punitive treatment. The latter factor also considers the nature of the relevant inquiry in parole revocation proceedings. *Morrissey* stated that the function of a parole board in a revocation hearing is to determine whether the parolee should "be recommitted to prison *or* other steps . . . taken to protect society and improve chances of rehabilitation." 408 U.S. at 480 (emphasis supplied). A hearing required to be held prior to the completion of the intervening sentence is thus premature and therefore prone to error, since the parolee is *already* recommitted and the other steps toward rehabilitation are properly within the realm of correctional officials within the prison and not the parole board. It is submitted that a revoca-

curring out-of-state since the parolee does not get a hearing until his return to the Kentucky prison. Of the 168 warrants charging new convictions as the basis for a violation, 100% were revoked in calendar year 1975. See the Appendix *infra*, for a statistical analysis of national revocations.

[23] The subjective element cannot be lightly discounted in parole revocation decision making. *Cf. Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973):

> "In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation."

tion hearing held at the conclusion of the intervening sentence will be more fair and reliable and less likely to be arbitrary than one conducted at some earlier and therefore inappropriate time.

C

Lastly, the validity of existing procedures must take into account the public and governmental interest, including the possible fiscal burden which the requirement of a more prompt hearing might entail. In *Morrissey*, the Court noted that the public interest in revocation proceedings is that they be fair and based on correct information and proper evaluation. This public interest stems from society's stake in the *chance* of the parolee's restoration "to a normal and useful life within the law."[24] But that chance has been reduced to a zero probability by an established violation of that law when the parolee is again imprisoned by virtue of yet another criminal conviction. The public's interest is that the administrative parole board operate in the manner in which it was designed to function by "making a prediction as to the ability of the individual to live in society without committing antisocial acts."[25] This predictive ability can only be exercised when the parolee, now an inmate, has the opportunity once again to assume his role in society. This cannot occur until the parolee has completed his term for the new crime, when he may emerge a very different, hopefully a better, person.

As to those parolees who emerge worse than they were when committed, the state has an important interest in ensuring that such dangerous persons are not at large among the citizenry. If a parole board *must* hear a revocation case prior to the service of a new prison term, the possibility exists, albeit slight, that

[24] *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

[25] *Id.* at 480.

parole might not be revoked. If the parolee subsequently develops serious behavioral problems in prison his freedom at the end of the intervening sentence is assured and the board is powerless to retain him longer to attempt corrective measures.

The above considerations suggest that the parolee's conduct in prison is part of the predictive function of a board in a revocation hearing based on a new criminal conviction. The state's interest is that the predictive function take into consideration everything that has transpired before, during and after a violation. To require, as a matter of due process, that the board conduct a revocation hearing prior to the service of the new sentence is to say that the administrative body must guess how the individual will do in a free society long before that possibility might occur. *Morrissey* does not mandate what is essentially a gamble before all the cards have been dealt.

In addition, the timing of the final hearing as it is presently conducted causes the least burden on the limited fiscal resources of the State. A full *Morrissey* hearing despite its informal characteristics nonetheless requires the presence of numerous people, including possible witnesses, board members, counselors, the parolee and perhaps the parolee's and state's respective attorneys. A hearing conducted prior to the parolee's return to the paroling state can only cause increased burdens on the government and be of little benefit to the parolee.

Several options have been suggested or have been tried in the attempt of various states to accord the parolee an interim sentence hearing. The California Supreme Court, after requiring prompter hearings, suggested that the parolee has the right to waive personal appearance at the final hearing. *In re Shapiro*, *supra* at 894. However, the court's opinion did not provide for the contingency of the parolee declining to waive personal appearance.

No court has suggested that a parolee be physically returned to the paroling state for a hearing prior to his release from another state, nor has any state attempted to do so. No parole board, to the knowledge of the *amici*, has the legal,[26] much less the logistical, ability to perform this interstate transportation feat. While criminal courts have this capability, since it is constitutionally required,[27] a parallel parole procedure would be even more onerous and expensive than the average criminal case. This is because the type of parole violation at issue here occurs, by definition, distant from the paroling state where the forum is located, but in the case of a criminal prosecution the situs of the crime, and thus the trial, is in the prosecuting state.

A parole violation hearing held soon after the offense transpired in a foreign state leaves the parolee with the singular defense of mitigating factors as to his otherwise good record in the distant community. This would therefore necessitate the transportation of not only the parolee with attendant guards, but also such other witnesses as the parolee desired. In addition, everyone would have to be returned; and if parole was revoked, the parolee would have to be brought back at the conclusion of the other sentence to begin the rest of his term in the original paroling state. This cumbersome procedure is thus more complex and expensive than even in a criminal case, and it would be odd for a parolee to have such an advantage when he is not entitled to

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[26] A state parole board has no equivalent of the judicial writ of *habeas corpus ad prosequendum*. The Interstate Agreement on Detainers has never been interpreted as applying to parole violation warrants, See *People v. Diamond*, 229 N.W.2d 857 (Ct. App., Mich. 1975), as to probation violators. Extradition is similarly inappropriate since the holding state is reluctant to agree because extradition offers no assurances that the requesting jurisdiction will return the prisoner. Proceedings under 18 U.S.C. § 4085 are seldom available even for criminal cases. *Smith v. Hooey*, 393 U.S. 374, 381 (1969).

[27] *Smith v. Hooey*, 393 U.S. 374 (1969).

the full panoply of rights due a defendant in a criminal prosecution.[28]

Another possibility for a more prompt hearing would be for the parole board to conduct the hearing in the foreign state.[29] This has been mentioned but rejected by a single court which found the "picture of correctional and parole officers fanning out across the nation" to be absurd. *In re Morales*, 43 Cal. App. 3d 243, 247, 117 Cal. Rpt. 645, 648 (1974). The same court rejected the prospect of the authorities in the other state conducting the hearing by proxy, since the procedures in one state might not comport with procedures in another. This pragmatic consideration has been demonstrated in a brace of Oregon cases which held that hearings conducted by Alaska and Washington were inadequate under Oregon law. *Waltz v. Board of Parole*, 18 Or. App. 652, 526 P.2d 586 (1974); *Vrieling v. Oregon State Board of Parole*, — Or. App. —, 534 P.2d 516 (1975).

While some of the above alternatives may be creative, none offer realistic solutions. The *amici* would emphasize that, whatever burden may be on the federal government in furnishing hearings in state prisons or rural jails distant from the nearest

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[28] In *Gagnon v. Scarpelli*, 411 U.S. 778, 782, n.5 (1973), the Court rejected arguments about difficulties in conducting hearings when the violations were inter-state. However, the petitioner in that case was only *arrested* for burglary and was not even tried for the offense by Illinois. Thus, there was a possibility of dispute even as to the existence of a violation. The facts in *Gagnon* and *Morrissey* were therefore identical except for the degree of the alleged violation and its out-of-state characteristic. The case at bar represents far more distinctions than just the degree of violation.

[29] This would be an almost physical impossibility for the Pennsylvania parole board, which must consider each revocation case with a full quorum as opposed to a single member or hearing officer as a matter of constitutional law. *Commonwealth ex rel. Rambeau v. Rundle*, 455 Pa. 8, 314 A.2d 842, 848 (1973).

regional parole officer, the burden on any individual state is far greater. This goes not only to more modest fiscal resources but also to the actual physical limitations of a state which has agents only within its borders but potential parole violators nationwide.[30] The funds and personnel allocated toward supervising parolees complying with the terms of their release should not be diverted into finding ways of granting speedier revocation hearings to those parolees who have clearly violated their parole and are incarcerated in prison.

D

Morrissey envisioned a revocation procedure which "should not cast a great burden on any state's parole system."[31] The present system with respect to criminally convicted violators accords a proper balance between the parolee's and government's interests and achieves an equitable result compatible with due process. In the last analysis, revocation hearings "[s]imply put, . . . determine whether the parolee will be free or in prison . . ." *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974). The hearing to determine revocation should be required only when the state's and parolee's similar interests in freedom mature and the prospect of prison *vel non* becomes a present reality with respect to the original sentence. No earlier hearing should therefore be of constitutional necessity.

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[30] Kentucky, for example, presently has outstanding detainers for 124 of its parolees incarcerated in 26 other states. In addition, 128 violation detainers are lodged with federal institutions across the country. Letter from Assistant Attorney General Patrick B. Kimberlin, III, of the Office of the Attorney General of Kentucky, June 2, 1976.

[31] *Morrissey v. Brewer*, *supra* at 490.

CONCLUSION

For all the foregoing reasons, the *amici* respectfully urge that the decision of the United States Court of Appeals for the Tenth Circuit be affirmed.

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APPENDIX

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1. Sources of Information

Statistical information for state parole revocation practices is of real benefit only for the period following *Morrissey v. Brewer*, 408 U.S. 471 (1972). Various state and private agencies have compiled information regarding the number of, and reasons for, revocations taken from reports submitted by the several state parole boards. In addition, studies have been conducted to compare the existing procedures with those prior to *Morrissey*. Unfortunately, information on parole practices with respect to the delay and the effect of the delay in revocation hearings is extremely variable and changes with each new court opinion. For the most part, information contained in this Appendix had to be obtained via telephone conversations with parole officers across the country and is accurate only for the period specifically mentioned. The latter caveat is appropriate for all studies done in this area.

2. Other Studies

The American Bar Association's Commission on Correctional Facilities and Services conducted a survey in the fall of 1972 to assess parole board compliance with *Morrissey v. Brewer*. Resources Center on Correctional Law and Legal Services, SURVEY OF PAROLE REVOCATION PROCEDURES, (Washington, D.C., January, 1973). The survey contained responses from forty-five parole boards. In general, the most diverse practice was with respect to the promptness of the final revocation hearing. *Supra* at 6. The study also concluded that there were a number of issues left unresolved by *Morrissey* not the least of which included situations "where the parolee is charged with a new crime . . ." *Supra* at 11. It is noteworthy that the issue

at bar was not even conceived of in the 1973 A.B.A. study and thus no figures were gathered.

The Uniform Parole Reports of the National Probation and Parole Institutes, National Council on Crime and Delinquency Center, Davis, California, has recently published statistics on prisoners paroled in 1973 and how they fared within one year of their release. U.P.R. Newsletter, November, 1975. The survey covered 41 states and the District of Columbia. Of the 24,521 males paroled in 1973, 20,295 were still continued on parole status by the end of one year. 1,058 had absconded from supervision. 2,106 were revoked for technical violations, which included violations of the law in lieu of prosecution. 1,062 or 4% of the total group were recommitted to prison in the same (886) or another jurisdiction (176). The figures do not reflect how many of those recommitted to prison had their parole revoked, but all are subject to revocation. The 4% figure does show, however, that the problem with respect to parolees convicted of new crimes is not insubstantial. It should be remembered that 4% represents new convictions within the *first year* of parole. The number of new convictions for all parolees during the total period of parole is probably much higher.

3. **Current Revocation Statistics**

The following charts show the latest available information on parole revocation by several of the states participating as *amicus curia*. The states were requested to furnish figures for the latest reliable twelve month period divided into type and number of parole violations. Very few states could provide numbers of parolees convicted of new offenses in other jurisdictions as a function of the total revocation population. However, where new felony convictions were sustained by parolees the incidence of revocation is very high for all states. Although the percentage

of "technical" revocations also appears to be great, most states have indicated that only the more serious "technicals" are now charged as a violation. This represents a departure from pre-Morrissey policy of charging virtually all technical violations. Most states have indicated that the policy with respect to new convictions remains as before, and all parolees sustaining a subsequent conviction will be charged as violators.

STATE: Kentucky

Period of Statistics: Jan. 1, 1975 through Dec. 31 1975

TYPES OF VIOLATIONS ALLEGED	NUMBER OF PAROLEES .... A: Charged w/ a violation but not in custody of parole state	B: Charged & arrested by parole state	C: Heard by the Parole Board	D: Parole revoked	E: Parole not revoked
New Criminal Conviction	252*	168	168	168	0
Technical	N.A.	69	69	69	0
Absconding	N.A.	161	161	161	0
Totals		398	398	398	0

Note: The difference between columns B and C represents cases not scheduled for a hearing within the above time frame, charges dropped at preliminary hearing (where held), or other attrition.

N.A. = No figures available

Other comments about state procedure:

*This figure represents those convicted in other jurisdictions with detainers. The detainers may have been placed in prior years but were in effect during the above twelve month period.

STATE: Illinois

Period of Statistics: Jan. 1, 1974 through Dec. 31, 1974

TYPES OF VIOLATIONS ALLEGED	NUMBER OF PAROLEES .... A: Charged w/ a violation but not in custody of parole state	B: Charged & arrested by parole state	C: Heard by the Parole Board	D: Parole revoked	E: Parole not revoked
Technical Violations Only	N.A.	227	227	216*	11
Court Recommitments	N.A.	161**	161	161	0
Totals		388	388	377	11

Note: The difference between columns B and C represents cases not scheduled for a hearing within the above time frame, charges dropped at preliminary hearing (where held), or other attrition.

N.A. = No figures available

Other comments about state procedure:

*Of the 216 technical revocations, 43 were reparoled.

**Of the 161 violations based on new court commitments only 1 was reparoled. The 161 figure represents parolees convicted in other states and returned after serving the sentence. Illinois cannot provide figures as to how many parolees were convicted in other jurisdictions and were returned.

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STATE: Tennessee

Period of Statistics: July 1, 1975 through June 30, 1976

TYPES OF VIOLATIONS ALLEGED	NUMBER OF PAROLEES .... A: Charged w/ a violation but not in custody of parole state	B: Charged & arrested by parole state	C: Heard by the Parole Board	D: Parole revoked	E: Parole not revoked
Convicted Out-of-state	18* w detainers	9**	5	5	0
Absconders	62				
Technical including Absconders received		104	94	90	4
Misdemeanors - in-state		58	58	58	0
Felony convictions in-state		240	240	240***	0
Totals	80	411	397	393	4

Note: The difference between columns B and C represents cases not scheduled for a hearing within the above time frame, charges dropped at preliminary hearing (where held), or other attrition.

N.A. = No figures available

Other comments about state procedure:

*These were placed during the year, other detainers are outstanding from prior years

**Of these 9 parolees 4 have not yet received a hearing

***Of these 240 revocations, 53 have been reparoled some time during the above period

STATE: Arkansas

Period of Statistics: Jan 1, 1975 through Dec 31, 1975

TYPES OF VIOLATIONS ALLEGED	NUMBER OF PAROLEES .... A: Charged w/ a violation but not in custody of parole state	B: Charged & arrested by parole state	C: Heard by the Parole Board	D: Parole revoked	E: Parole not revoked
Absconders	N A	N A	44	32	12
Other Technical	N A	N A	70	57	13
New Criminal Conviction	N A	130*	130	129	1**
New Conviction Out-of-State	7***				
Totals			254	218	26

Note: The difference between columns B and C represents cases not scheduled for a hearing within the above time frame, charges dropped at preliminary hearing (where held), or other attrition.

N.A. = No figures available

Other comments about state procedure:

*Arkansas does not provide a preliminary hearing for parolees convicted of new crimes so there is no attrition between being charged with a violation and meeting the board for a final hearing

**This conviction was for shoplifting

***The seven detainers were filed within the above year. An unknown number of detainers are outstanding from prior years